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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BOURNE CO.,

Plaintiff,

- against -

TWENTIETH CENTURY FOX FILM
CORPORATION, FOX BROADCASTING
COMPANY, TWENTIETH CENTURY FOX
TELEVISION, INC., TWENTIETH CENTURY
FOX HOME ENTERTAINMENT, INC., FUZZY
DOOR PRODUCTIONS, INC., THE CARTOON
NETWORK, INC., SETH MACFARLANE,
WALTER MURPHY,

Defendants.

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07 Civ. 8580 (DAB)

DECLARATION OF SANDY WILBUR

1. I was hired by Plaintiff Bourne Co. (“Bourne”) to perform a musicological analysis of and comparison between the songs “I Need a Jew,” (hereinafter “Jew”) which was featured in an episode entitled “When You Wish Upon a Weinstein” of the television show The Family Guy (the “Episode”), and the classic song “When You Wish Upon a Star” (hereinafter “Star”) and render an opinion as to (a) the similarity of the two songs and (b) whether “Jew” could have been written in a manner that would take less material from “Star” while still

conjuring up that song in the mind of the listener. I was also asked to analyze whether there was any similarity between “Star” and “Clair de Lune” by Debussy.

2. I am currently President of Sandy Wilbur Music, Inc., DBA Musiodata. I first served as an expert witness in a copyright infringement case in 1981 and have been working extensively as a musicologist since 1988. I have compared and analyzed thousands of musical pieces and samples, have created charts and exhibits, have done public domain, prior art, and copyright valuation research and have consulted on a wide range of musical issues for law firms, advertising agencies, record companies, music publishing companies and music production companies. Each year I handle an average of 158 musicological and/or sample analyses, research the public domain status of over 84 songs, and do nine prior art research cases. On average, I am consulted on approximately 32 litigation matters per year, about five of which are ongoing at any given time. The bulk of this work deals with contemporary music. A current copy of my curriculum vitae is attached hereto as Exhibit “A.”

3. I have not provided expert testimony at trial or by deposition in the last four years. I have not authored any publications relating to music in the previous ten years.

4. As an expert in the field of forensic musicology, I have worked on a number of high profile litigations and consulted on major albums and on a Grammy award winning movie soundtrack. In 1981, I testified as an expert on behalf of the defendants in *Crete Records v. Benton & Bowles Advertising, Schlitz Brewing Co. and J.J. Johnson* (Federal California case). In the trial of *Rene Santrail, et al. v. Kirk Burrell p/k/a M.C. Hammer*, I gave a deposition in 1995, and in 1998 I appeared as an expert witness at trial on behalf of the plaintiff (Federal New York case). In 1996, I served as a court-appointed expert for the Central District of California in

Frank Gari Productions v. Coca-Cola Co., Mercenary Productions, et al. I was the musicologist and song researcher for the 2000 Coen Brothers' film and soundtrack album "O Brother Where Art Thou," which won a Best Album Grammy in 2001. In 2006, I was the musicologist on behalf of several defendants in *Armour v. Beyonce Knowles et al.* (Federal Texas case).

5. I am also a composer, arranger and lyricist, with over forty recorded songs and five chart singles to my credit. I produced, wrote, arranged and performed for my album "All Through the Night," released by Caedmon/Harper Audio. I have also composed and produced hundreds of jingles and scores for major corporate clients, including: Proctor & Gamble, AT&T, Coors, Wendy's, Hardees, Tyco, and UNICEF, among others. Some of the artists who have performed my jingles include: Lee Greenwood, Teddy Pendergrass, Kool and the Gang, Janis Ian, Patti Austin, The Platters, Gap Band, Dr. Hook, Tony Bennett and Kermit the Frog. From 1980 to 1982, I was Associate Music Director at Benton & Bowles Advertising Agency, now DMB&B.

6. I have received awards from ASCAP, CLIO, The New York International Film Festival and The American Song Festival, among others. I am or have been a member of ASCAP, SAG, AFTRA, AFM, Women in Music, and the Songwriters Guild of America, among others.

7. I received a B.A. from Sarah Lawrence College, and an M.A. in Ethnomusicology from the University of California at Los Angeles, with emphasis on African, Indonesian, and Native American music and culture. My M.A. dissertation was entitled "Music of the Pawnee Indians; With Special Reference To Present Day Oklahoma Practices." I have taught music courses, given lectures, or worked with college students on a for-college-credit basis at several

universities and institutes, including Rutgers University, The Songwriter's Guild of America and the State University of New York at Purchase.

8. Attached as Exhibit "B" is a true and correct copy of my transcription of the original arrangement of "Star" from the movie Pinocchio, as performed by Cliff Edwards.

9. Attached as Exhibit "C" is a true and correct copy of my transcription of the original arrangement of "Star" from the movie Pinocchio, as performed by Cliff Edwards, transposed into the key of C. I will refer to this as the "CE arrangement."

10. Attached as Exhibit "D" is a true and correct copy of the published sheet music for "Star." I will refer to this as the "Sheet Music."

11. Attached as Exhibit "E" is a true and correct copy of my transcription of "Jew" which I did from a DVD copy of the Episode. I will refer to this as "Jew."

12. My transcription of "Jew" does not include the musical interlude that begins after bar 24 of my transcription because the interlude is not part of the song; it is a separate and unrelated composition. This is not only my opinion, it is a fact that has been confirmed by the composer of "Jew," Walter Murphy. (Murphy Tr. 21:23-24:2).

13. My transcription of "Jew" also does not include the reprise at the end of "Jew" because, in my opinion, it is merely a repeat, with minor time changes, of the last five measures of the music of "Jew." A reprise or musical repeat is a common compositional device, and it is not normally considered to be an additional, standalone section of a song. In this case, this reprise allows for a sung lyric to describe what is happening in the story line with the arrival of the Jewish accountant ("Now my troubles are all through, I have a Jew").

14. Attached as Exhibit "F" is a visual comparison of the melody, chords, and rhythm of the CE arrangement, Sheet Music and "Jew."

15. I did not consider the four opening instrumental bars, nor the next sung eight bars of the Sheet Music in my analysis because they were obviously different from the CE arrangement or not used at all. Proper musicological methodology dictates that I first identify those sections in the pieces that are similar and then compare and contrast those similar sections. This is why, in comparing the Sheet Music, the CE arrangement, and "Jew," I left out all the introductions. Because each were unique and wholly distinct from each other -- including between the CE arrangement and the Sheet Music -- they all became irrelevant to my analysis. I left out the interlude in "Jew" because, as I stated above, it is a separate piece, as confirmed by its composer. The four sung measures of "Jew" that I refer to as a reprise are similar to the last four or five measures of all three pieces. As I stated in my deposition, I should have added this reprise to my analysis. However, it does not add any new or transformative material and, in fact, increases the degree of similarity between "Jew" and "Star." I chose not to consider it believing that the average person would recognize this reprise as functioning as an extension of the story line of "Jew." Whether or not the reprise is included in my analysis, it does not change my conclusions in any way.

16. Attached as Exhibit "G" is a true and correct copy of the leadsheet for an early version of "Jew" which was written by Walter Murphy, the composer of "Jew." I will refer to this as the "Leadsheet."

17. Attached as Exhibit "H" is a true and correct copy of the score for "Jew" which was written by Mr. Walter Murphy, the composer of "Jew." I will refer to this as the "Score."

18. Attached as Exhibit “I” is a Glossary of Common Musical Terms. For additional help please go to <http://www.dolmetsch.com/musictheory6.htm>.

19. Attached hereto as Exhibit “J” is a CD containing a number of illustrative musical tracks in mp3 format to which I will refer throughout my Declaration as follows: (Track __ of Exh. J).

20. I have read the report and examined the transcriptions included in Professor Lawrence Ferrara’s Report and Declaration. In addition, I attended Professor Ferrara’s deposition and read the deposition transcript of Walter Murphy, the composer of the music for “Jew.”

21. I reviewed and relied upon all of the above in rendering my opinion below.

“JEW IS EXTREMELY SIMILAR TO STAR”

22. In my professional opinion, “Jew” as performed in the Episode is extremely similar to both the Sheet Music and the CE arrangement of “Star.”

23. The main difference between the Sheet Music and the CE arrangement, other than the different introductions (including both the instrumental four measures and the first eight sung measures of the Sheet Music which are not found in the CE arrangement) and the differences in arrangement and orchestration (the Sheet Music is a piano arrangement while the CE arrangement uses a full orchestra), is the inclusion of performance elements used in the CE arrangement. Every arrangement of a song is different and every singer of a song uses techniques to make that song their own. The CE arrangement uses many tempo variations (speeding up and slowing down) – some quite extreme – throughout the song in both the sung

part and the orchestral parts as an obvious and dominant performance element. Some of these changes in tempo are mimicked in “Jew,” though to a much lesser extent. Trying to incorporate so many dramatic shifts in speed in a transcription can be quite subjective. Because I considered these tempo changes to be performance elements, I chose not to attempt to notate them as this would tend to be both arbitrary and confusing.

The First Four Measures

24. The first four measures of “Jew” are nearly identical to both the Sheet Music and the CE arrangement in at least 6 different ways. (NOTE: Henceforth, when using “Star,” I am referring to *both* the Sheet Music and the CE arrangement of “Star.” Otherwise, I will indicate whether I am referring to either the Sheet Music or to the CE arrangement.)

25. The first four melody notes of the seven note melodic hook of “Star” (**g g f e**) -- are identical to the first four melody notes of “Jew.” These four notes are the most important notes in the hook of “Star” and constitute what I refer to as an “identifying signature” (Exh. F). I believe this signature is unique since I was unable to find any prior art (other songs using these four notes in the same way before the publication of “Star”).

26. The intervallic relationship of this identifying signature (an ascending octave followed by a descending whole step and half step) is repeated in bar 3 of “Jew,” though starting on a different note (**a a g f#**). (Exh. F). Indeed, if one compares the identifying signature of “Star” (in bar 1 repeated in bars 9 and 25) and the four notes in bar 3 (repeated in bars 11 and 27) of “Jew” there is no denying the similarity. (Track 1 of Exh. J).

27. In “Jew,” the three melody notes in bar 2 that follow the identifying signature harmonize with the corresponding notes in “Star.” For the three melody notes in bar 4 of “Jew” that follow the bar 3, which copies the intervallic pattern of the first four notes of the hook, the first and last melody notes harmonize with the corresponding notes in “Star” and the middle notes are identical. (Track 2 of Exh. J; Exh. F). The harmonizing notes are significant because after hearing the identifying signature of “Star” in “Jew,” one will continue to hear “Star” in his or her mind while “Jew” is playing, without being disturbed or surprised by a discordant note. (Track 3 of Exh. J; Exh. F).

28. The chords of the first bar and the first beat of the second bar of both “Star” and “Jew” are nearly identical. The Sheet Music contains an **Aaug** chord in the third beat of Bar 1 that is not present in the CE arrangement or in “Jew,” but this difference is insignificant because the **Aaug** chord is simply the **A7** chord that follows it (**a c# e g**) with the addition of the melody note (**f**). To the average listener, the differences between these two chords when the melody is played is practically imperceptible. The same is true for the difference between the **A7** chord (**a c# e g**) in “Star” and the **C#dim** chord (**c# e g**) in “Jew.” (See Exh. F).

29. The lyric in “Jew” uses the words “wish upon a star” from the lyric and title of “Star” in measures 3 and 4. Although “Jew” uses this lyric in the second phrase rather than the first, as found in “Star,” its placement in the measures (beat 3 of measure 3 through the four beats of measure 4) is identical to “Star.” And, as already mentioned, it uses the identical intervals as in the identifying signature of “Star,” the ascending octave followed by the descending whole step and half step in measure 3 followed by notes that harmonize with the melody of “Star” in measure 4. (Exh. C).

30. The melodic rhythm is identical in the first four measures of both “Jew” and “Star.” Moreover, the melodic rhythm is identical in the Score, Leadsheet, Sheet Music, and my transcription of the CE arrangement. (Exhs. F, G, H).

The Songs in Their Entirety

31. The structure of “Jew” and the CE arrangement are almost identical and the four main sections are represented as: A A1 B A2. (Exh. F). The numbers following the section letter represent the degree of difference between the four sections. Here, the A section (measures 1 – 8) is made up of two two-measure phrase followed by a four-measure phrase. A1 (measures 9 – 16) differs musically from A only by minor changes at the end (in measure 16). The third or B section (measures 17 -24) departs from what has come before. At the end of the B section, the CE arrangement adds a 2-measure “Oh- - “ part while “Jew” adds an approximately 15-measure interlude that is unrelated to either “Jew” or “Star.” A2 differs from A and A1 by elongating the last three notes (the last two notes use identical pitches) and increasing the section length to ten sung measures. Both “Jew” and the CE arrangement avoid the 8-measure sung introduction found in the Sheet Music. Nonetheless, the main sections of the Sheet Music, A A1 B A2, are identical though the last two notes in the A2 section are different from both “Jew” and the CE arrangement and the length of the section remains 8 measures. It is very obvious that the structural similarities and differences in “Jew” are related to those found in the CE arrangement of “Star.”

32. In comparing the melodic contour (the shape and direction of the musical phrases) of the A sections of “Jew” and “Star,” I find the direction is either parallel or opposite. The melodic contour (of the identifying signature discussed in Sections 25 – 27 above) is parallel in

measures 1 and 3 (also 9 and 11, and 25 and 27) of “Star” and in the last three measures (31 – 33) of “Jew” and the CE arrangement. Melodic contour is opposite in measures 2, 4, 5, and 7 – 8 (and also 10, 12, 13, 15 – 16, and 26, 28, 29) in both “Jew” and “Star.” The melodic direction is down in “Jew” and up in “Star” in measures 2 and 4, up in “Jew” and down in “Star” in measure 5, and up and down in “Jew” in measures 7 – 8 while down and up in “Star” in the same measures. The same pattern is found the A1 section and the first three measures of the A2 section in both “Jew” and “Star” while the last three measures of “Jew” go up in the same manner as the CE arrangement. In the B section of both “Star” and “Jew,” the second two-measure phrase parallel one another a fourth interval apart (measure 19) while the last two chords (in measure 20) are basically the same (Cdim C in “Star” and Cdim7 C in “Jew”). In measure 22, there are rising parallel eighth notes a third interval apart while the two notes, one in measure 23 and one in measure 24 also parallel one another a fourth interval apart. The rising parallel eighth notes, the only series of consecutive eighth notes in both “Star” and “Jew,” are found in the identical place in both songs. This parallel contour, combined with the use of the identical last two notes in the CE arrangement and “Jew” (high harmony notes **e** and **g** in measures 32 - 33), plus the repeated use of the identifying signature throughout the song, constitute an obvious taking and, additionally, the use of “Star” as a template for “Jew.”

33. All of the melodic and harmonic similarities that appear in the first four bars of both songs (the A section) which I discussed above in paragraphs 24 through 28 apply to the other two A sections (A1 - measures 9 - 12 , and A2 - measures 29 - 32) in both “Jew” and “Star.” (Exh. F).

34. The lyric in “Jew” frequently uses vowels that rhyme with the corresponding lyric in “Star” and help make the songs sound even more similar. The following chart shows where

the identical vowel sounds occur. When they fall on the end of the phrases, as they do in the first three phrases (section A), they emphasize the similarities between the songs. When there are two similar sounding vowels in the same phrase in both songs (found in the sixth and twelfth phrases), it only adds to the substantial taking of the song. (Exh C).

“When You Wish Upon a Star”	“I Need a Jew”	Where
star	far	end of first phrase, measure 2
dif (di)	wish (wi)	middle of second phrase, measure 3, beat 3
are	star	end of second phrase, measure 4
you	Jew	end of third phrase, measure 8
dream (ee)	need (ee)	sixth phrase, measure 15, beat 1
You	Jew	end of sixth phrase, measure 16
kind	find	end of seventh phrase, measure 18
dreams (ee)	need (ee)	twelfth phrase, measure 31
true	Jew	end of twelfth phrase, measure 33

35. The melodic rhythm in “Jew” is nearly identical to the Sheet Music throughout the entire song. This can also be seen in the Score and Leadsheet of “Jew.” Though there are tempo shifts used as performance elements in the CE arrangement, I find that the melodic rhythm is also similar to that arrangement as well and, as I stated before, mirrors some of these tempo shifts but to a lesser extent in “Jew.” (Exhs. C, F, G, H).

36. One or both basic chords are the same in both “Jew” and “Star” in measures 1, 2, 4, 5, 8, 9, 10, 12, 13, 16, 20, 23, 24, 25, 26, 28, and 29. The last chord is identical in the Sheet Music, the CE arrangement and “Jew,” although both the CE arrangement and “Jew” are elongated so that the last chord falls in measure 33 – 34 while it occurs in measure 32 in the Sheet Music. (Exh. F).

37. Both songs contain the identical number of notes (95) and “Jew” and the CE arrangement contain the identical number of measures. (Exh. F). As noted above, the sheet music ends in measure 32, while both “Jew” and the CE arrangement elongate the last two notes and end in measures 33-34.

38. The time duration of both “Jew” and the CE arrangement are nearly identical (92 seconds for “Jew” and 91 seconds for the CE arrangement). The sheet music doesn’t have a tempo indicated and so can not be compared.

39. “Star” and “Jew” use common 4/4 meter (four beats to each measure and the quarter note gets one beat). The Sheet Music, starting at the chorus, is 32 measures long while both the CE arrangement and “Jew,” as stated earlier, are 34 measures long. The tempo fluctuates in both the CE arrangement and “Jew.” If you try to tap out the beat in both the CE arrangement and “Jew” you will quickly see how varied the tempos are, especially in the CE arrangement. However, the Sheet Music, the Score, the Leadsheet, and my transcription of both “Jew” and the CE arrangement are all transcribed using almost identical melodic rhythm, without regard to these shifting performance elements.

40. Other musical elements of the two songs are also remarkably similar. Some of the similarities in “Jew” are with certain of the performance elements in the CE arrangement of “Star” while others are with the underlying song “Star” as set out in the Sheet Music. Both include the following:

41. The last two notes of “Jew” are identical to the last two notes of the CE arrangement (e and g) while the last two notes of the Sheet Music are b and c. (Exh. F). The

fact that both “Jew” and the CE arrangement use not only the identical notes, but the identical elongated time is striking.

42. Both “Jew” and the CE arrangement use a loose tempo with retards at the ends of many of the phrases and the beginning of some phrases sped up. For example, the first measure is faster than the second measure.

43. Each sung section of “Jew” is nearly identical in length to the CE arrangement. In “Jew,” the four section lengths are 21, 20, 18, and 33 seconds respectively totaling 92 seconds. In the CE arrangement, the four section lengths are 20, 20, 20, and 31 seconds respectively totaling 91 seconds. (Exh. F). Obviously, this is not indicated in the sheet music and appears to be a way of mimicking some of the performance elements in the CE arrangement.

44. Harmonically the pieces are also quite related. As I stated previously in paragraph 36, 18 measures of “Jew” use one or more of the same basic chords as found in “Star.” There are 58 chords in “Star” and 65 chords in “Jew,” including the last four that occur after the last word is sung. Of these 65 chords from “Jew,” 25 use the same basic corresponding chord in “Star,” 34 share three of the same chord tones with “Star” and 15 share two of the same chord tones with “Star.” In other words, 49 of the 65 chords from “Jew” are made of the same basic notes as the corresponding chord in “Star.” This is the case for both the CE arrangement and the Sheet Music. (Exh. F).

45. Indeed, except for measures 21 and 22 in the B section of “Jew,” all of “Star” can be sung using the chords found in “Jew” and vice versa.

46. The chords in “Jew” and “Star” also use the same chromatic device. There are two types of chromatic movement in each song. The first chromatic chord movement is going from the diminished chord to the major chord (e.g., **Cdim** to **C** in measures 4, 12, 20, and 28 of both songs) where two of the chord’s notes move in parallel a third interval apart (notes **c eb gb** of the **Cdim** chord move to **c e g** of the **C** major chord).

47. The other chromatic chord movement is when three notes, often the lowest notes of three consecutive chords, move chromatically either up or down. One example of this device can be found in “Star” by examining the three chords starting with beat one of measure 5 (**C/E Ebdim7 Dmin7** or the lowest notes of the three chords **e eb d**) which go down chromatically. This can be easily seen in the Sheet Music, as the bottom note corresponding to the lyric “Anything your heart” and in the same fifth measure of each of the next two A sections.

48. The same chromatic device, though going in the opposite direction, can be found by examining the three consecutive chords starting on the third beat of measure 5 in “Jew” (**C+5/E F F#dim** or the lowest notes **e f f#**) which go up chromatically. The same consecutive chromatic chords are repeated in measures 13 - 14 and 29 - 30 of “Jew.” In fact, the first three chords starting in measure 1 of “Jew” (**C C#dim** and **Dm**) and again in measure 3 of “Jew” (**Dm D#dim C/E**) use this chromatic movement. Though this chromatic movement goes down in “Star” and up in “Jew,” it is still a very recognizable device that adds to the similar sound of both songs. Additionally, using diminished chords along with the chromatic movement also adds to the similarity in sound between “Jew” and “Star.”

**“JEW INCORPORATES MUCH MORE OF “STAR”
THAN WAS NECESSARY TO REFERENCE THAT SONG**

49. Given how musically similar “Jew” is to “Star,” as explained above, it is my opinion that the songwriters could easily have written “Jew” in a way that incorporated fewer of such similarities, while still reminding the listener of “Star.”

50. There were numerous creative ways in which the composer could have referenced “Star” without so substantially taking it. For instance, the same first four measures of “Jew” as heard in the Episode could have been used after which “Jew” could have gone in another musical direction entirely. In that scenario “Star” would have been referenced in the mind of the listener by taking one of the most recognizable musical works without taking so much of the other creative content from “Star.”

51. The above is just one example. There are many different combinations of musical elements and compositional devices that could have been used by the composer to accomplish the same end result – referencing “Star” without taking so much of it. In my professional opinion, it is both the *amount* of the taking and the repetition and *time duration* of the taking that so emphasizes the similarities between the songs.

52. Indeed, Walter Murphy, the composer of “Jew,” admitted that he originally composed a version of “Jew” that was less similar to “Star” than the version ultimately used in the Episode, and that Seth MacFarlane, made him change the song, against his better judgment to make “Jew” sound more like “Star.” (Murphy Tr. 10:12-11:9, 12:7-13:8).

53. The Score accurately represents “Jew” as it appeared in the Episode. Although the piano part was not written out, it is common practice to write out the chords and have the

pianist play those chords as was done in this case. Although there are slight differences between my transcription of “Jew” and the Score with respect to certain chord representations, I view these differences as minor and they do not affect my opinion and conclusions. (Compare Exhs. E and H).

54. There is no question that the Leadsheet moves “Jew” further away from “Star” than the version of “Jew” used in the Episode. In my professional opinion, the Leadsheet still easily evokes “Star” in the mind of the listener but overall takes less of “Star.” The structure, melodic rhythm, harmonic similarities and lyric rhyming similarities, including the phrase “wish upon a star,” are all obviously pointing to the song “Star.”

55. In the Leadsheet, the four notes of the melody in both the first and second phrases of each A section (measures 1, 3, 9, 11, 25, and 27) are different from the Score. As discussed above, the first four notes in “Jew” as sung in the Episode are identical to “Star” (**g g f e**). In the Leadsheet, the first four melody notes are (**g e g e**). Only the last note is used in the same corresponding position while the second note in “Star” (**g**) is found in both the first and third notes of “Jew.”

56. The second phrase (third bar) of “Jew” uses the identical intervallic relationship as the opening phrase (ascending octave followed by descending whole step and half step); the Leadsheet does not use this identifying signature. In “Jew” the notes are **a a g f#** whereas the notes in the Leadsheet are **a f a f#**. Again only the last note is used in the same corresponding position and the melodic contour is clearly different.

57. These two melodic changes certainly render the Leadsheet version of “Jew” less problematic and less similar than the version of “Jew” used in the Episode even though many melodic and rhythmic similarities still remain and still evoke “Star” in the mind of the listener.

58. There are also different chords in some of the measures of the Leadsheet as compared to the Score. The Leadsheet and Score both contain 62 chords. Of those, 31 chords share three of the same chord tones and 19 share two of the same chord tones. The following chart shows where these differences lie. The measure numbers in the Score are numbered three higher than the corresponding Leadsheet measure numbers because of the three-measure introduction in the Score. The first two rows (with three measure numbers in each) show the same chord changes in each of the three A sections.

	LEADSHEET		SCORE
Measures	Chords	Measures	Chords
4,12,28	Em7	7,15,IM6-B4	Csus9/E
6,14,30	Fmaj	9,17,IM6-B6	Fmaj7
16	C	19	C D/C C
19	Dm7/G	22	Dm7/G G7(b9) Dm7(b5)/G
20	Fm/G C	23	B7/C Cmaj7
21	F E7sus E7	24	Dm7/G G7(b5) Dm7(b5)/G
22	Am7	25	Am9 Am Am#7 Am7

59. Most of the differences in the Leadsheet reflect a simplified, less fleshed-out chord pattern. The underlying harmony in the Leadsheet is not that different from the Score except for the **Em7** chord in measures 4, 12, and 28 -- which I think is an odd choice given the melody notes used. Otherwise, the harmonic pattern in the Leadsheet is not that different from the Score or from my findings of harmonic similarities between “Jew” and “Star.”

60. Although the Leadsheet is still similar to “Star,” and therefore easily reminds the listener of “Star,” the Leadsheet is substantially less similar than the Score of “Jew” used in the

Episode because it takes less from “Star,” specifically the identifying signature, the first four melody notes of the hook of “Star.”

**PROFESSOR FERRARA’S OPINION IS BASED ON
FAULTY METHODOLOGY AND SHOULD NOT BE CREDITED**

61. Professor Ferrara does not address what the average person would hear when listening to “Jew” other than to say that it conjures up the song “Star.” Instead, Professor Ferrara focuses on less significant or immaterial differences between the songs, and arrives at conclusions that either contradict his previous statements or are refuted by Walter Murphy, the composer of “Jew.” He also transcribed both songs in a way that overemphasized minor performance elements in the songs, such as pauses or retards, to overstate differences between “Jew” and “Star.” In my professional opinion Professor Ferrara has focused on these immaterial differences between the songs in an effort to make the songs appear more different than they really are.

There are Many More Harmonic Similarities
Between “Star” and “Jew” Than Professor Ferrara Acknowledges

62. For example, Professor Ferrara ignores the fact that the second phrase (bar 3) of “Jew” repeats the identical intervallic relationship of the identifying signature (ascending octave followed by descending whole step and half step) and that this is repeated again in the third bars of the other two A sections.

63. On pages 7 and 8 of Professor Ferrara’s Report, he claims to make a harmonic comparison between “Jew” and “Star” but does nothing more than chart the chords of each song over each other and then leave it to the reader to figure out which chords are identical and which are not. This is not the way chords work. A chord is made of many pitches and can be notated

in numerous ways based on, among other things, the key the piece is written in and the ear of the person doing the notation.

64. Attached hereto as Exhibit “K,” is a harmonic chart I have created which compares my chords and Professor Ferrara’s chords for “Star” to the Sheet Music (numbers 1 - 3 of the chart) and my chords and Professor Ferrara’s chords for “Jew” to the Score and Leadsheet (numbers 5 – 8 of the chart).

65. For example, in Bar 5 of the A section of “Star,” Professor Ferrara notates a **Cmaj9** chord (**c e g d**) simply because the melody starts with a “**d**” resolving to the chord tone “**e**” on the second beat. This chord is virtually the same as the **C** chord (**c e g**) in Bar 5 of the A section of “Jew.” Again, however, he says these chords are different even though to the average listener they sound virtually the same. (Exh. K; Track 4 of Exh J).

66. Yet another example is in Bar 8 of the A section of both songs. Professor Ferrara notates the chords **C (c e g) G9 (g b d a)** and **G7 (g b d f)** in “Star” and **C (c e g) Gsus (g c d) G (g b d)** in “Jew.” (Exh. K). Both are basically C and G chords. (Track 5 of Exh. J).

67. In sum, I have found that throughout Professor Ferrara’s chord transcriptions he tries to reconcile non-chord tones in the chord itself rather than just leave the non chord tone to the melody line. Throughout both songs, there are many non-chord tones that resolve to chord tones on the second or fourth beat of the measure.

68. For example, the third beat of Bar 1 in the A sections of “Jew” (**Aaug**) and the first beat of Bar 5 in the A section of “Jew” (**Cmaj9**) are merely adding the melody note to the chord, when in each case it could be the simpler chord (**A7** and **C** respectively), which is how I

transcribed it. (Exh. K; Track 6 of Exh. J). In any event, there is no doubt that these chords are similar and related. Again, it appears that Professor Ferrara is attempting to exaggerate the differences between the songs.

69. Along similar lines, at his deposition, Professor Ferrara claimed that many of my chord notations were incorrect when they were merely slight variations on the same chord he notated. As I state above, chord notation is representational and reasonable experts can disagree as to the notation of a chord. What must be remembered, however, is that differently notated chords can and often do sound similar or even identical.

70. For example, in Bar 5 of the A section of “Jew,” Professor Ferrara transcribes the chord as **Abaug/E (e ab c e)** while I call the chord **C#5/E (e ab c)**. Both chords use the same notes – Professor Ferrara simply adds an extra **e** on the top -- and sound nearly identical. (Exh. K; Track 7 of Exh. J).

71. Another chord Professor Ferrara claimed I incorrectly notated can be found on page 8 of his report in bar 8 of his A1 section going from **Gsus** to **G** in “Jew” (**g d g c** to **g d g b**) as compared to the chord I use the corresponding section which is a **Dm7/G** to **Ddim7/G** (**g d f a c** to **g d f ab b**). (Exh. K; Track 8 of Exh. J). Both sets of chords are based on the dominant **G** chord, use the same lowest and highest notes, and sound very similar. The difference is that I have added other notes heard in the chord played in the track while Professor Ferrara does not. Interestingly, the composer’s Score uses the corresponding chords **Dm7/G** to **G7b9** (**g d f a c** to **g d f ab c**) which is identical except for the last note (**c** instead of **b**) to my transcription.

72. Referencing Exhibit K, one can see that with respect to “Jew” that there are several places where Professor Ferrara’s chords do not correspond to mine or Mr Murphy’s.

However, Mr. Murphy has confirmed that the Score accurately represents “Jew” as performed in the Episode. (Murphy Tr. 14:19-18:23).

73. The most important of Professor Ferrara’s mistakes are found in three measures in the A section of “Jew” and four measures in the B section of “Jew:” Bars 2, 3, and 7 of all three A sections (specifically the **F/A** and **G/B** in measure 2 corresponding to the lyric “worked so far,” and the **Am** and **A1/2dim7** in measure 3 corresponding to “so I’ll wish u-” and Bar 7 corresponding to the lyric “need a”), Bars 1 - 3 of the B section (specifically the **C/G** corresponding to “Where,” the two chords in the next measure **G** and **Eb/G** corresponding to “find,” and the **C/G** and **G** of the third measure corresponding to “a Baum or”) and Bar 7 of the B section (specifically the **Dm** chord corresponding to the lyric “tax-.” (See notated chart below where chords discussed are in bold).

74. Professor Ferrara’s transcription of these chords are, in my opinion, simply inaccurate and have the effect of making the songs appear more harmonically different than they actually are. The first chord in measure 2 of Professor Ferrara’s transcription of “Jew” is **F/A** while the corresponding chord in “Star” and the Wilbur and Murphy transcriptions of “Jew” use the same chord (**Dm**). Another example is in bar 7 of the B section in “Jew” where Professor Ferrara puts a **Dm** (**d f a** corresponding to “tax-”) which is not related to the **Fm6** chord in “Star” but where everyone else uses a **Dm7b5** (**d f ab c**) or the equivalent **Fm6/D** (**d f ab c d**) which is related to the **Fm6** of “Star.”

SECTION A

Chords for Section A:

- Wilbur: Dm, G, Dm, D#dim, C/E, C, C+/E, F, F#dim, C/G, Dm7/G, Ddim7/G
- Ferrara: E/A, G/B, Am, A#7, C, C, A#+/E, F#7, F#dim, G
- Murphy: Dm7, G7, Dm7, D#dim, Csus2/E, C, E+7, F#7, F#dim, C/G, Dm7/G, G7b9

SECTION B

Chords for Section B:

- Wilbur: Dm7/G, Ddim7/G, Em7/G, Eb7/G, Dm7/G, Ddim7/G, Cdim7, C, F, E7, Am7, Fm6/D
- Ferrara: C/G, G, G, Eb7/G, C/G, G, Cdim, C, Am, E, Am, Ab+, C/G, Dm
- Murphy: Dm9/G, G13b9, Em7/G, Eb9/G, Dm7/G, G7b9, Dm7b5/G, B7/C, C#7, Dm7/G, G7b9, Dm7b5/G, Am9, Am, Am#7, Am7, Dm7b5

The Melody of The Four Sections of “Jew” and The Reprise or “Coda”
 Incorporate 24% Identical Notes and 34% Identical or Very Related Notes Of “Star.”

75. Of the 95 notes in the four sung sections of “Jew” (96 according to Professor Ferrara), plus the 11 notes in the Reprise (3 of which are identical to “Star” making a total of 106 notes), 24 notes (23%) are identical to “Star,” and 36 notes (34%) are identical or very melodically related to “Star.” I believe that Professor Ferrara was aware of these facts when he decided to include the unrelated interlude in his analysis, thus increasing the amount of notes in “Jew” to make the songs appear less related.

76. Professor Ferrara examined only the identical pitches in the two compositions, finding 23 (22 in the body of the song at issue) pitches in common. Of these 22, 12 are the first four identifying signature notes of the A sections. He completely ignores the repeated

identifying signature in “Jew” in measures 3, 11, and 27 (ascending octave followed by descending whole step and half step) even though it is clearly derived from the melodic hook of the first four notes of “Star.” Indeed, if you compare bar 1 of “Star” to bar 3 of “Jew” there is no denying the similarity. (Track 1 of Exh. J).

77. As I stated earlier, Mr. Murphy testified that he first created the Leadsheet to fit the lyrics of “Jew” being careful not to get too close to the song “Star” and that later, Mr. MacFarlane insisted that he change the Leadsheet melody to be closer to “Star.” In particular, Mr. MacFarlane had Mr. Murphy copy the first four identifying signature notes of “Star” into measures 1, 9, and 25 of “Jew” (**g g f e** in the Score versus **g e g e** in the Leadsheet) and copy the intervallic pattern of the first four notes into measures 3, 11, and 27 (**a a g f#** in the Score versus **a f a f#** in the Leadsheet) (Murphy Tr. 10:12-11:9, 12:7-13:8, 13:17-14:9, 18:24-20:13, Exhs. G, H).

78. Mr. Murphy testified that he was concerned about getting too close to “Star” because he was contracted to provide original music for Fox. And, I agree with him that the use of the first four indentifying signature notes in measures 1, 9 and 25 and the repeat of the figure in measures 3, 11, and 27 – a total of 24 notes - is indeed problematic as is evidenced by his own Leadsheet in which these notes were not used. (Exh. G).

79. Indeed, had the original melody from the Leadsheet been used for “Jew,” only 19 notes (instead of 25) would have been identical to “Star” and there would not have been any additional related notes in measures 3, 11, and 27.

80. Professor Ferrara also ignores that the second and fourth bars of the A sections of “Star” and “Jew” harmonize and complement each other. In “Star” the notes in bar 2 are **c# d a**

and in “Jew” the notes are **g f d**. There is no denying that these notes complement and harmonize with each other. (Track 2 of Exh. J). The same is true for bar 4 where the notes in “Star” are **f# g c** and in “Jew” the notes are **a g e** -- Here the middle note is actually identical (**g**) and the first and third note are harmonized. (Track 3 of Exh. J). As I discussed above, this harmonizing is significant because after hearing the four identifying signature notes of “Star” in “Jew,” the listener will continue to hear “Star” in their mind while “Jew” is playing because the harmonizing will not disturb or surprise their ear with a discordant note.

81. In addition to his flawed comparisons with regard to identical and related pitches discussed above, Professor Ferrara also fails to remark on the parallel movement of the melody in five of the eight measures of the B sections of “Jew” and “Star” and other common elements found in both B sections that help make “Jew” similar to “Star.” This parallel movement can be clearly seen in my comparison transcription, (Exh. F), in the three notes of measure 19 a fourth interval apart (“a Baum or” and “She brings to”), the first two notes of measure 21 a fifth interval apart (“The sweet” and “To teach”), the five notes in measure 22 that are a sixth interval apart (all but the second note in the top line and the third note in the bottom line corresponding to the lyrics “fill -- of their sec-ret” and “how to - - and do my”), and the two notes in measures 23 and 24 that are an interval of a minor second apart (“long-ing” and “tax-es”). These parallel parts correspond to 12 notes in the B section, all but the last note of which rises melodically, thereby building the tension until the last sung note (“long-ing” and tax-es) which goes down. Combining the parallel melodic movement of the B section with the speeding up and slowing down in a similar way in both performances in the B sections, the similar rhyme scheme (“find” and “kind”) along with the use of the same internal rhyme device in the same corresponding

places in the two songs (“love” and “of” in “Star” and “Stein” and “whine” in “Jew”), contributes to the real and obvious similarities between the two pieces.

Melodic Rhythm and Performance Issues

82. I believe that Professor Ferrara’s insistence that performance elements are the same thing as melodic rhythm is simply another way to try to make “Jew” appear less similar to “Star” than it really is.

83. Although Professor Ferrara states in his report that the sequence of notes is more important than the melodic rhythm of those notes, he transcribes the melodic rhythm in such a way that, at least visually, the two pieces look very different. Cliff Edwards’ performance of “Star” is extremely fluid, with many retards, fast and slow phrases, and dramatic shifts in tempo even within phrases, in both the orchestra as well as the vocal part. Singers phrase a written line in many interpretive ways. This is all a part of the vocal style of the individual and the underlying arrangement of the song. However, unless the underlying musical bed is relatively constant, it is very difficult to reasonably notate what is happening, and there can be more than one interpretation. Notation is merely representational. The ebb and flow found in the Cliff Edwards sung version of “Star,” which is what I and Professor Ferrara transcribed, can be compared to moderate traffic on a freeway where there are times when the speed slows, sometimes even stops momentarily, then speeds up, but you are still moving forward in time.

84. In footnote 2 of his report Professor Ferrara states that although there are differences in the melodic rhythm of “Star” between the sheet music and the “rhythmically free singing” in the Cliff Edwards’ version from “Pinocchio,” the conclusions in his report apply to both versions of “Star.” However, Professor Ferrara goes to great lengths to compare Cliff

Edwards version of “Star” to “Jew” in Exhibits E and F of his report. At his deposition, Professor Ferrara admitted that if he had compared the Sheet Music to “Jew,” there would have been many more rhythmic similarities, indeed, he marked 68 notes with identical melodic rhythms between the two songs. (Ferrara Tr. 120:24-128:9; see attached Exhibit “L” a true and correct copy of Exh. E to Professor Ferrara’s Report which he marked at his deposition).

85. Professor Ferrara also overstated the differences in melodic rhythms between the songs by including the unrelated interlude in his transcription, analysis and comparisons of “Jew.” As discussed in more detail below, by including the interlude, Professor Ferrara claimed that “Jew” had 157 notes when it has considerably fewer; this diluted the percentage of identical rhythms and pitches he claims exists between the songs..

86. Professor Ferrara’s transcription of the Cliff Edwards version of “Star” is also problematic. For example, in measures 1 and 2 of Professor Ferrara’s transcription of “Star” the notes that correspond to “wish u-pon a star” are transcribed as if the pulse or beat of the song were steady throughout the phrase. There are certainly several ways one could transcribe this phrase, but it seems peculiar to land on the first beat of measure 2 with the word “a” rather than the second syllable of the word “u-pon.” Rather, if you view the words in that part of the phrase as sped up, my transcriptions would be more accurate.

87. A second example of Professor Ferrara’s problematic transcription can be found in measures 22 - 25 of his transcription of “Star” where the notes are spread out in such a way that the corresponding lyrics “and do my ta-xes” in “Jew” and “their se-cret long-ing” in “Star” do not line up one on top of each other. Rather, if in “Star” you viewed a significant slowdown starting at the end of measure 20 and an even more dramatic slowdown in measure 22 with “-fill-

ment of” and culminating with the notes that go with the first syllable of the lyric “long-ing” – all of which represents the most important buildup and release in the song, it would line up lyrically and correspond as it does in my transcription.

88. If you were to conduct the Cliff Edwards arrangement of “Star” you would discover an ebb and flow to the song that is very difficult to accurately represent in notation. You would also discover that “Jew” imitates much of the ebb and flow of the Cliff Edwards arrangement of “Star,” though to a much lesser extent. When singing “Where to find” in “Jew” and “Fate is kind” in “Star” the phrase is sped up from the slower tempo that preceded it. In both songs, there is a substantial slowdown starting in measure 22 (“how to whine and do my” and “-fill-ment of their se-cret”). In “Jew” that slowdown continues through “ta-xes” while in “Star” the first syllable is slightly faster while the second syllable is somewhat slower on the word “long-ing.” In both, a very similar performance device is used.

Structurally, the Melodic Interlude in “Jew” is Not Related to “Star”

89. Professor Ferrara spends a great deal of time describing the structure of both songs. In Exhibit A of his report, he transcribes what he considers the introduction to “Star” (which I call an overture since it undoubtedly references other songs in the film), the interlude of “Jew,” and what he refers to as the “coda” (which I call the reprise) in “Jew.” Of these three sections, only the reprise is related to “Jew,” and the music of the reprise (Professor Ferrara does not address lyrics at all in his report) merely repeats, with minor time changes, the last five measures of “Jew.” In any event, as noted above, when I add the reprise to my analysis, the amount of identical notes actually *increase* between the two songs.

90. Professor Ferrara concludes that “a significant structural difference is represented by the creation of new structures, i.e. Section C and the Coda in “Family Guy song” that are not in ‘Pinocchio song.’” As I state above, the reprise is not a new entity, it is merely a repeat, which is a common musical device and does not transform the piece into something new, but, rather, contributes to the similarity of the two pieces.

91. With respect to the interlude, the composer of “Jew,” testified that it is a different piece. (Murphy Tr. 21:23-24:2). Indeed, by calling the section “Interlude,” and identifying it as a separate composition on the cue sheet, Mr. Murphy acknowledged that it is not part of “Jew” and it is clear, when watching the Episode, that it is an underscore to picture.

92. By calling the interlude a “transformative” change to the song “Jew,” Professor Ferrara adds over 50% more musical material that is completely unrelated to “Jew.” I do not believe that adding an unrelated instrumental section to a song can transform it into something else and I do not believe Professor Ferrara should have included the interlude in his analysis. The addition of the interlude to the transcription of “Jew” unfairly overstates the differences between the two songs.

The Lyrics are an Important Component Of “Jew” As Compared to “Star

93. Professor Ferrara also ignored the lyrics altogether, avoiding the obvious comparison between the relationship of the words to the notes, beats, and similar sounding syllables.

94. As I state above, there are obvious and numerous rhymes in “Jew” that point to “Star.” In addition, the songs share a number of rhyming and rhythmically similar phrases.

Below are six phrases in “Jew” that rhyme and share the same rhythm as a corresponding phrase in “Star” and one phrase that shares the same internal rhyming pattern as “Star.”

“Jew”	“Star”
So I’ll wish upon a star (3-4)	When you wish upon a star (1-2)
Far (2)	Star (2)
need a Jew (7-8)	come to you (7-8)
need a Jew (15-16)	drea-mers do (15-16)
where to find (17-18)	fate is kind (17-18)
(internal rhyme) Stein and whine (20 & 22)	(internal rhyme) love & of (20 & 22)
I need a Jew (31-33)	your dreams come true (31-33)

There are no Parodic Musical Devices in “Jew”

95. Professor Ferrara asserts that there are “musical devices” in “Jew” that poke fun at “Star,” even though Walter Murphy, the composer of “Jew” did not identify any of these devices when asked at his deposition. (Murphy Tr. 29:11-30:19). Moreover, I do not agree with Professor Ferrara that the “musical devices” he discusses in his report are parodic in any sense of the word.

“STAR” IS NOT SIMILAR TO “CLAIRE DE LUNE”

96. I understand that the Defendants have suggested that “Star” is extremely similar to and derived from Debussy’s “Claire de Lune.”

97. The claim that “Star” is based on the first seven notes of “Claire de Lune” is preposterous. Claire de Lune is in the key of Db major. Transposed to the key of C, for comparative purposes, (attached hereto as Exhibit “M”), the first seven notes of “Claire de Lune” are: **g g e d e d c**, as compared to the first seven notes of “Star” which are: **g g f e c# d a**.

98. The harmonic patterns of the first seven notes of both pieces are completely different from one another. The only similarity is an initial upward octave leap, but not even in

the same place in the measure. The melodic rhythm, melodic contour, meter (4/4 as compared to 9/8), and underlying harmony are completely and totally different from one another. I found no other similarities, other than the initial octave leap, in any other part of either song. The fact that “Claire de Lune” was even presented as being similar to “Star” suggests to me that the first four notes of the hook of “Star” are quite unique and recognizable and that no other prior art exists which uses these four notes in the same way. Otherwise, they would have been presented.

CONCLUSIONS

99. In conclusion, I believe that some of the most important elements of “Star” were used and repeated in “Jew” and that the use of these obviously similar elements over a period of a minute and a half constitutes a substantial taking. For this usage, it is my professional opinion that it would have been appropriate to have licensed “Star.”

100. Moreover, “Jew” could have been composed in a manner that took significantly less of these elements, while still reminding the listener of “Star.”

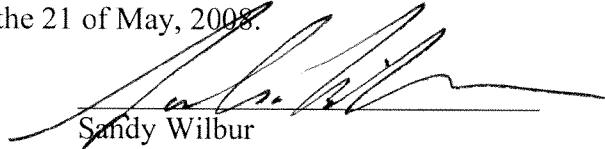
101. To the best of my ability and in my professional opinion, I also believe that Professor Ferrara used improper methodologies to overstate the differences between the two songs at issue in this case which I do not view as proper. It appears that he: 1) used chord notation with little or no explanation as to how chords work e.g., that chords which are notated differently often contain many of the same notes and sound similar, 2) ignores melodic similarities such as intervallic relationships and melodic contours, 3) transcribes the melodic rhythm as if performance elements and melodic rhythm were one in the same in order to make the pieces appear more different than they are, 4) includes unrelated material to dilute similarities between the two songs, and 5) ignores lyrical similarities altogether.

102. I do not believe that the addition of an unrelated interlude or a reprise constitutes a transformative change. In fact, I do not believe that the nature of the changes, either lyrically or musically, poke fun at the original work, but, rather, use it for a commercial purpose that is unrelated to the song “Star.”

103. Finally, “Star” was clearly not derived from “Claire de Lune.”

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed in New York, New York on the 21 of May, 2008.



Sandy Wilbur